

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMES & YON H. SCUDIERI	:	DECISION
	:	DTA NO. 816047
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1992.	:	

Petitioners James and Yon H. Scudieri, Unit 15494, Box 894, 20th Support Group, APO, AP 96218, filed an exception to the determination of the Administrative Law Judge issued on November 25, 1998. Petitioners appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither party filed a brief on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation correctly determined that petitioner Yon H. Scudieri improperly adjusted for out-of-state income on her New York State nonresident income tax return for the year at issue.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On January 22, 1996, the Division of Taxation (“Division”) issued to Yon H. Scudieri (“petitioner”) a Notice of Deficiency asserting additional personal income tax due in the amount of \$225.76, plus interest, for a total amount due of \$275.08 for the year 1992.

On July 19, 1996, the Division issued a letter to petitioner with an explanation of the Division’s position stating, in relevant part, as follows:

On December 22, 1992, the New York State Court of Appeals ruled in ***Lawrence J. Brady et al., v. the State of New York et al.***, that a nonresident married couple filing a joint federal income tax return must file a joint New York State income tax return. The combined income of both spouses must be used to determine the base tax subject to the Income allocation percentage, even if only one spouse has income from New York sources. This decision applies to tax years 1992 and thereafter.

The Court of Appeals further held that the spouse with no New York income cannot be held liable for any tax, penalty or interest that may be due.

Items of income on your Form IT-203 tax return must be entered in the Federal Amount Column exactly as they appear on your federal return. This column must be computed as if you were a full year resident of New York State.

The Tax Reform and Reduction Act of 1987 substantially changes the method of figuring your nonresident tax. You must first figure a base tax as if you were a New York State resident, including income, gains, losses and deductions from all sources. Then you must multiply the base tax by a fraction whose numerator is income from New York sources, and whose denominator is federal adjusted gross income.

Please be advised you are not being taxed on your Non New York Income (Active Duty Military). However, based on the above State [sic] New York State Court of Appeals decision, all income earned must be used in computing the base tax. Then only a portion of the allocated [sic] is New York tax based on the income percentage, line 56, which is the ratio of the New York income to total income.

For the year at issue, petitioner Yon H. Scudieri filed a Form IT-203 (a New York State Nonresident Income Tax Return) under the filing status “married filing separate return.” During the year, petitioner Yon H. Scudieri was employed by the U.S. Department of the Army as a dental assistant at the United States Military Academy in West Point, New York. Petitioner Major James Scudieri was stationed in New York State on active duty with the military.

On the income section of the New York State nonresident return, petitioner Yon H. Scudieri listed her wages, interest and dividend income exactly the same in both the Federal amount column and the New York State column. The addition of these three items resulted in Federal adjusted gross income, and subsequently New York adjusted gross income, of \$19,161.63. Ms. Scudieri then subtracted the standard deduction from this amount to arrive at taxable income of \$14,411.63 and tax due of \$777.00. Major Scudieri’s income was not shown on the return. Petitioners filed a joint Federal income tax return for the year 1992 which indicated their Federal adjusted gross income to be \$55,400.00. This figure included Major Scudieri’s non-New York source income derived from his active military status.

Pursuant to Internal Revenue Code § 6103, the Division obtained from the Internal Revenue Service the amounts shown on petitioners’ Federal tax return. Using the information shown on their return, the Division recomputed petitioners’ tax liability as follows:

RETURN LINE	PREVIOUS AMT.	ADJUSTED AMT.
New York Adjusted Gross Income	\$19,161.00	\$55,400.00
New York Deduction	4,750.00	9,500.00
New York Taxable Income	14,411.00	45,900.00
New York State Tax	777.00	2,899.00

Income Percentage	100%	34.59%
Allocated New York State Tax	777.00	1,002.76
Total New York State Tax Due	777.00	225.76

The Division determined the income percentage by dividing petitioners' New York source income (\$19,161.00) by their total Federal adjusted gross income (\$55,400.00).

At the Bureau of Conciliation and Mediation Services ("BCMS") conference, the amount of tax due was reduced to \$133.87. The reduction was based upon the removal from New York source income of the interest and dividends received which were not connected with a business, trade or profession carried on in New York. The removal of these items resulted in petitioners' New York source income being \$17,407.00. Dividing this figure by their Federal adjusted gross income resulted in an income percentage of 31.42% and tax due of \$910.87.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Since Tax Law § 601(former [e][1]) required an initial computation of tax due to be made as if a nonresident taxpayer were a resident, the Administrative Law Judge looked to the appropriate sections of Article 22 of the Tax Law, applicable to resident individuals, in order to ascertain the meaning of terms.

The New York taxable income of a resident individual is his New York adjusted gross income less his New York deduction and exemptions (Tax Law § 611[a]). New York adjusted gross income of a resident individual means his Federal adjusted gross income, as defined in the United States Internal Revenue Code for the taxable year, with certain modifications as specified in section 612 (Tax Law § 612[a]).

Petitioners challenged the State's use of their non-New York income to calculate the tax rate to be applied to their New York source income. Petitioners argued that only New York source income can be used in the computation of the tax rate to be applied to their New York source income.

The Administrative Law Judge rejected this argument, noting that the New York State Court of Appeals had previously addressed this issue in *Brady v. State of New York* (80 NY2d 596, 592 NYS2d 955, *cert denied* 509 US 905, 125 L Ed 2d 692). The Administrative Law Judge stated that the Court in *Brady* held that the statutory procedure for determining a nonresident's tax on income earned in New York by taking into account New York and non-New York source income in order to calculate the tax rate to be applied to the New York income does not violate the Privileges and Immunities or Equal Protection Clauses of the United States Constitution since similarly situated residents and nonresidents receive equal treatment.

Petitioners here, like the taxpayers in *Brady*, objected to the use of non-New York source income to increase the tax rate which is applied to their New York income. However, as the statutory procedure applies the tax rates in a nondiscriminatory manner and only to taxable New York income, the Administrative Law Judge concluded that the Division's adjustment to petitioner Yon H. Scudieri's nonresident income tax return by taking into account petitioner Major Scudieri's non-New York income to compute the tax rate, was proper.

ARGUMENTS ON EXCEPTION

Petitioners take exception to the reliance on *Brady v. State of New York (supra)* by the Administrative Law Judge. Petitioners state that the petitioners therein did not have income

derived solely from active-duty military pay and where the spouse's New York income was based solely on temporary residence within the State due to military assignment orders.

Furthermore, petitioners argue that the Administrative Law Judge failed to address the constitutionality of Tax Law § 601(d) and (e) as well as the opinion rendered by the Court of Appeals in *Brady*.

OPINION

We affirm the determination of the Administrative Law Judge. Petitioners have set forth the same arguments that they presented to the Administrative Law Judge below. Moreover, with respect to petitioners' constitutional arguments, we note that we lack the jurisdiction to determine the constitutionality of a statute on its face (*Matter of Unger*, Tax Appeals Tribunal, March 24, 1994).

Therefore, after a thorough review of this record, we can find no basis upon which to modify the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James and Yon H. Scudieri is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of James and Yon H. Scudieri is denied; and

4. The Notice of Deficiency dated January 22, 1996, as modified by the Bureau of Conciliation and Mediation Services, is sustained.

DATED: Troy, New York
August 12, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner